

Memorandum 99-33

Effect of Dissolution of Marriage on Nonprobate Transfer to Former Spouse: Possible Revisions

In discussing the Commission's recommendation relating to the Effect of Dissolution of Marriage on Nonprobate Transfers with members and staff of the Assembly Judiciary Committee, it became apparent that a bill implementing the recommendation would be difficult to enact in its present form because of concerns by some members of the Assembly about the adequacy of post-dissolution support of former spouses. This memorandum discusses possible adjustments to the recommendation that might address those concerns. A revised draft of the proposed legislation, showing the changes discussed in this memorandum, is attached.

This memorandum also discusses a newly identified problem related to the proposed law — the effect of an automatic temporary restraining order (ATRO) on a person's ability to change a nonprobate transfer beneficiary designation or sever a joint tenancy during the pendency of a proceeding for dissolution of marriage.

ASSEMBLY JUDICIARY COMMITTEE CONCERNS

The proposed law would prevent the operation of a revocable nonprobate transfer to a former spouse, absent clear and convincing evidence that the decedent intended to preserve the transfer to the former spouse. This proposal is based on the assumption that a typical divorcing person does not intend to preserve a nonprobate transfer to a former spouse. The proposed law could create two problems:

- (1) In some cases, it might defeat the actual intentions of a former spouse who intends to preserve a nonprobate transfer to a former spouse.
- (2) It might exacerbate the problem of inadequate support of former spouses.

It may be possible to ameliorate these problems and thereby increase the likelihood of enactment of the proposed law by modifying the proposed law to account for circumstances in which it is more likely that a divorcing person intends to preserve

a nonprobate transfer to a former spouse, or in which such an intent should be presumed as a matter of policy.

Special Circumstances

Circumstances in which a divorcing person may be more likely to intend to preserve a nonprobate transfer to a former spouse, or in which an intent to support a former spouse should be presumed as a matter of policy, might include the following:

Lengthy marriage. Former spouses whose marriage was lengthy may feel an ongoing obligation to support each other. It may also be true that a former spouse of a lengthy marriage is more likely to require continued support than a former spouse of a shorter marriage, because of foregone career opportunities. Thus, it may be appropriate to except former spouses of lengthy marriages from operation of the proposed law.

Minor children. Where a minor child of the former spouses is still alive at the time of one of their deaths, the decedent may intend to preserve a nonprobate transfer to the surviving former spouse as an indirect means of providing support for the child. Thus, it may be appropriate to add an exception to the proposed law for cases where a minor child of the former spouses is living at the time of the transferor's death.

Former spouse's principal residence. Where the property to be transferred by a nonprobate transfer is the principal residence of a former spouse at the time of the transferor's death, the transferor may intend to preserve the nonprobate transfer in order to ensure that the former spouse is not displaced on the transferor's death. Thus, it may be appropriate to add an exception to the proposed law for cases where the property to be transferred is the principal residence of the surviving former spouse.

Proposed Change

The exceptions described above could be implemented by amending Sections 5600 and 5601 along the following lines:

5600. ...

(b) Subdivision (a) does not cause a nonprobate transfer to fail in either of the following cases:

(1) The nonprobate transfer is not subject to revocation by the transferor at the time of the transferor's death.

(2) There is clear and convincing evidence that the transferor intended to preserve the nonprobate transfer to the former spouse.

(3) The transferor and the former spouse were married to each other for more than 10 years.

(4) A minor child of the transferor and the former spouse is living at the time of the transferor's death.

(5) The property that would be affected is the former spouse's principal place of residence at the time of the transferor's death and the dissolution or annulment of the transferor's marriage to the former spouse preceded the transferor's death by 5 years or more.

The ten-year duration in paragraph (3) is intended to distinguish a lengthy marriage, where the former spouses might feel a continuing sense of obligation to one another, from a shorter marriage where such a sense of obligation is less likely. The ten-year period is consistent with the rule that a marriage of ten years or more is presumed to be a "marriage of long duration" for the purpose of determining the court's continuing jurisdiction with respect to spousal support. See Fam. Code § 4336. The five-year duration in paragraph (5) is intended to distinguish a case where the property in question is probably intended to be the home of the occupying former spouse from one where the former spouse's occupation is probably intended to be temporary. The time periods chosen for these provisions are somewhat arbitrary and the Commission should consider whether other periods would be more appropriate.

Potential Problems

The proposed changes might create a number of problems:

Windfall to former spouse. The purpose of the proposed law is to prevent an unintended nonprobate transfer to a former spouse. The exceptions discussed above could undermine this general goal by carving out areas in which the proposed law would not operate, thereby increasing the likelihood that a former spouse will receive a windfall. However, to the extent that the exceptions reflect circumstances in which divorcing parties' are more likely to actually intend to preserve a nonprobate transfer to a former spouse this risk is minimized.

Substitution of judgment. As the proposed law becomes more elaborate in an effort to predict a typical person's intentions in varying circumstances, we run the risk of developing a normative scheme for what we believe the typical person *should* intend in those circumstances. Such a scheme may be proper in a context like intestacy, where the decedent has no expressed intentions, but may be

inappropriate in the proposed law, where we are second-guessing a person's expressed intentions.

Inconsistency with other law. One of the advantages of the proposed law is that it would treat nonprobate transfers similarly to wills. This advantage would be undermined by the changes discussed above as there are no analogous exceptions in the law governing wills. On the other hand, even with the changes, the proposed law would make the effect of dissolution of marriage on a nonprobate transfer much more similar to the effect of dissolution of marriage on a will than it is under existing law (under existing law dissolution of marriage has no effect on a nonprobate transfer).

Effect on third parties. The exceptions set out above would make it more difficult for a third party to know if a nonprobate transfer to a former spouse is effective or not, perhaps increasing the potential for misplaced reliance by a third party purchaser or encumbrancer. However, this should not be a significant problem. The proposed law protects a good faith purchaser or encumbrancer for value who relies on the apparent termination of a nonprobate transfer. See proposed Prob. Code §§ 5600(d) & 5601(c). The proposed law also protects a good faith purchaser or encumbrancer who relies on the affidavit or declaration of a former spouse asserting that the former spouse's rights to real property transferred on the decedent's death were not affected by the proposed law. See proposed Prob. Code § 5602. The addition of new exceptions would not affect these protections.

Conclusion

The Commission should decide whether the changes discussed above make sense in light of the potential problems they could create. An alternative to making those changes would be to set the proposal aside for now and revisit it later.

PROPERTY RESTRAINTS

The summons in a proceeding for dissolution or annulment of marriage contains an ATRO restraining certain actions with respect to the parties' property. See Family Code Section 2040, which provides in relevant part:

2040. (a) In addition to the contents required by Section 412.20 of the Code of Civil Procedure, the summons shall contain a temporary restraining order:

...

(2) Restraining both parties from transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community, or separate, without the written consent of the other party or an order of the court, except in the usual course of business or for the necessities of life and requiring each party to notify the other party of any proposed extraordinary expenditures at least five business days before incurring those expenditures and to account to the court for all extraordinary expenditures made after service of the summons on that party. However, nothing in the restraining order shall preclude the parties from using community property to pay reasonable attorney's fees in order to retain legal counsel in the proceeding.

(3) Restraining both parties from cashing, borrowing against, canceling, transferring, disposing of, or changing the beneficiaries of any insurance or other coverage, including life, health, automobile, and disability held for the benefit of the parties and their child or children for whom support may be ordered.

...

The staff has learned that many trial courts interpret the ATRO as restraining severance of joint tenancy and change of a beneficiary designation in an instrument making a nonprobate transfer — perhaps under the language restraining the parties from “in any way disposing of any property.” A change in beneficiary to life insurance is clearly restrained under subdivision (a)(3).

This appears to be a problem. A typical party to a pending dissolution proceeding would not want to preserve a nonprobate transfer to a spouse. If that person dies after the summons has been served but before final judgment is entered, that person would never have had an opportunity to sever a spousal joint tenancy or modify a nonprobate transfer to a spouse. This seems unfair, particularly considering that the person who initiated the proceeding could have made exactly those sorts of changes before filing, in which case only the non-filing party would be meaningfully restrained.

Nor is it clear why a party to a pending dissolution should be restrained from terminating a revocable nonprobate transfer to a spouse. A person would not be restrained from modifying a disposition to a spouse in a will simply because a dissolution proceeding is pending. The rule should probably be the same for a revocable nonprobate transfer. In each case, only a future donative transfer, in which the beneficiary has no vested interest, is at issue. Of course, if the property to be transferred is community property, both spouses have an interest and one spouse should not be able to change a beneficiary designation unilaterally.

However, existing law already provides that written spousal consent is required to make or modify a nonprobate transfer of community property. See Prob. Code §§ 5010-5032 (nonprobate transfers of community property). It isn't clear what additional protection is added by the ATRO's blanket restraint on changing beneficiary designations.

The Commission should consider whether to study this problem further. It would be a fairly simple matter to draft a tentative recommendation to amend Family Code § 2040 along the following lines:

2040. (a) In addition to the contents required by Section 412.20 of the Code of Civil Procedure, the summons shall contain a temporary restraining order:

...

(2) Restraining both parties from transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community, or separate, without the written consent of the other party or an order of the court, except in the usual course of business or for the necessities of life and requiring each party to notify the other party of any proposed extraordinary expenditures at least five business days before incurring those expenditures and to account to the court for all extraordinary expenditures made after service of the summons on that party. However, nothing in the restraining order shall preclude the parties from using community property to pay reasonable attorney's fees in order to retain legal counsel in the proceeding.

(3) Restraining both parties from cashing, borrowing against, canceling, transferring, or disposing of, ~~or changing the beneficiaries of~~ any insurance or other coverage, including life, health, automobile, and disability held for the benefit of the parties and their child or children for whom support may be ordered.

(b) Nothing in subdivision (a) restrains a party from severing a joint tenancy or changing a beneficiary designation in an instrument making a nonprobate transfer of property on death.

(c) ...

We could then solicit comments from family law practitioners, to learn if the reform would raise unanticipated problems.

Respectfully submitted,

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Exhibit

PROPOSED LEGISLATION

Prob. Code §§ 5600-5603 (added). Nonprobate transfer to a former spouse

SEC. _____. Part 4 (commencing with Section 5600) is added to Division 5 of the Probate Code, to read:

PART 4. NONPROBATE TRANSFER TO A FORMER SPOUSE

§ 5600. Failure of nonprobate transfer to former spouse

5600. (a) Except as provided in subdivision (b), a nonprobate transfer to the transferor's former spouse, in an instrument executed by the transferor before or during the marriage, fails if, at the time of the transferor's death, the former spouse is not the transferor's surviving spouse.

(b) Subdivision (a) does not cause a nonprobate transfer to fail in either of the following cases:

(1) The nonprobate transfer is not subject to revocation by the transferor at the time of the transferor's death.

(2) There is clear and convincing evidence that the transferor intended to preserve the nonprobate transfer to the former spouse.

(3) The transferor and the former spouse were married to each other for more than 10 years.

(4) A minor child of the transferor and the former spouse is living at the time of the transferor's death.

(5) The property that would be affected is the former spouse's principal place of residence at the time of the transferor's death and the dissolution or annulment of the transferor's marriage to the former spouse preceded the transferor's death by 5 years or more.

(c) Where a nonprobate transfer fails by operation of this section, the instrument making the nonprobate transfer shall be treated as it would if the former spouse failed to survive the transferor.

(d) Nothing in this section affects the rights of a subsequent purchaser or encumbrancer for value in good faith who relies on the apparent failure of a nonprobate transfer under this section or who lacks knowledge of the failure of a nonprobate transfer under this section.

1 (e) As used in this section, “nonprobate transfer” means a provision of either of
2 the following types:

3 (1) A provision of a type described in Section 5000.

4 (2) A provision in an instrument that operates on death, other than a will,
5 conferring a power of appointment or naming a trustee.

6 **Comment.** Subdivision (a) of Section 5600 establishes the general rule that a nonprobate
7 transfer to a former spouse fails if, at the time of the transferor’s death, the former spouse is
8 not the transferor’s surviving spouse. “Surviving spouse” is defined in Section 78.

9 Paragraph (1) of subdivision (b) provides that a nonprobate transfer to a former spouse
10 does not fail by operation of subdivision (a) if, at the time of the transferor’s death, the
11 nonprobate transfer is not subject to revocation by the transferor. This precludes operation of
12 subdivision (a) where a nonprobate transfer is irrevocable on execution, or later becomes
13 irrevocable by the transferor (for reasons other than the death or incapacity of the transferor).
14 For example, a court may order a spousal support obligor to maintain life insurance on
15 behalf of a former spouse. See Fam. Code § 4360. If a person dies while subject to such an
16 order, subdivision (a) would not affect the rights of the transferor’s former spouse under the
17 policy. The irrevocability of a trust can be established by certification of the trust’s contents.
18 See Section 18100.5.

19 Paragraph (2) of subdivision (b) provides that a nonprobate transfer to a former spouse
20 does not fail on the transferor’s death if there is clear and convincing evidence that the
21 transferor intended to preserve the nonprobate transfer. For example, if after divorcing, the
22 transferor modified the beneficiary terms of a life insurance policy without changing the
23 designation of the former spouse as primary beneficiary, this might be sufficiently clear and
24 convincing evidence of the transferor’s intent to preserve the nonprobate transfer to the
25 former spouse so as to prevent the operation of subdivision (a).

26 Subdivision (c) governs the effect of failure of a nonprobate transfer under this section. For
27 the effect of a failed nonprobate transfer of property, see Section 21111. For the effect of a
28 failure of a trustee designation, see Section 15660.

29 Subdivision (d) makes clear that nothing in this section affects the rights of a good faith
30 purchaser or encumbrancer for value who relies on the apparent failure of a nonprobate
31 transfer under this section or who lacks knowledge of the failure of a nonprobate transfer
32 under this section. For the purpose of this subdivision, “knowledge” of the failure of a
33 nonprobate transfer includes both actual knowledge and constructive knowledge through
34 recordation of a judgment of dissolution or annulment or other relevant document. See Civ.
35 Code § 1213 (recordation as constructive notice to subsequent purchasers and mortgagees).
36 The rights of a subsequent purchaser or encumbrancer are also protected if the purchaser or
37 encumbrancer relies on an affidavit or declaration executed under Section 5602. The remedy
38 for a person injured by a transaction with a subsequent purchaser or encumbrancer for value
39 is against the transacting former spouse and not against the purchaser or encumbrancer.

40 In general, Section 5003 protects a property holder from liability for transferring the
41 property according to the terms of the instrument making the nonprobate transfer, even if the
42 nonprobate transfer has failed by operation of subdivision (a).

43 This section may be preempted by federal laws regulating employer-provided benefits. See
44 Metropolitan Life Ins. Co. v. Hanslip, 939 F.2d 904 (10th Cir. 1991) (ERISA preempts state
45 law providing that dissolution of marriage revokes designation of former spouse as
46 beneficiary to employer-provided life insurance). It is therefore especially important on
47 dissolution or annulment of marriage to review beneficiary designations for employer-
48 provided death benefits.

1 **§ 5601. Severance of joint tenancy between decedent and former spouse**

2 5601. (a) Except as provided in subdivision (b), a joint tenancy between the
3 decedent and the decedent's former spouse, created before or during the
4 marriage, is severed as to the decedent's interest if, at the time of the decedent's
5 death, the former spouse is not the decedent's surviving spouse.

6 (b) Subdivision (a) does not sever a joint tenancy in either of the following
7 cases:

8 (1) The joint tenancy is not subject to severance by the decedent at the time of
9 the decedent's death.

10 (2) There is clear and convincing evidence that the decedent intended to
11 preserve the joint tenancy in favor of the former spouse.

12 (3) The decedent and the former spouse were married to each other for more
13 than 10 years.

14 (4) A minor child of the decedent and the former spouse is living at the time of
15 the transferor's death.

16 (5) The property that would be affected is the former spouse's principal place of
17 residence at the time of the decedent's death and the dissolution or annulment of
18 the decedent's marriage to the former spouse preceded the decedent's death by 5
19 years or more.

20 (c) Nothing in this section affects the rights of a subsequent purchaser or
21 encumbrancer for value in good faith who relies on an apparent severance under
22 this section or who lacks knowledge of a severance under this section.

23 **Comment.** Subdivision (a) of Section 5601 establishes the general rule that a joint tenancy
24 between a decedent and the decedent's former spouse is severed if, at the time of the
25 decedent's death, the former spouse is not the decedent's surviving spouse. "Surviving
26 spouse" is defined in Section 78. This effectively reverses the common law rule that
27 dissolution or annulment of marriage does not sever a joint tenancy between spouses. See,
28 e.g., *Estate of Layton*, 44 Cal. App. 4th 1337, 52 Cal. Rptr. 2d 251 (1996).

29 Note that property acquired during marriage in joint tenancy form is presumed to be
30 community property on dissolution of marriage or legal separation. See Fam. Code § 2581.
31 See also *In re Marriage of Hilke*, 4 Cal. 4th 215, 841 P.2d 891, 14 Cal. Rptr. 2d 371 (1992)
32 (community property presumption applies after death of former spouse if court has entered
33 judgment dissolving marriage and reserved jurisdiction over property matters). This section
34 does not affect the community property presumption and does not affect property
35 characterized as community property under that presumption.

36 This section applies to both real and personal property joint tenancies, and affects property
37 rights that depend on the law of joint tenancy. See, e.g., Veh. Code §§ 4150.5, 5600.5
38 (property passes as though in joint tenancy). This section does not affect United States
39 Savings Bonds, which are subject to federal regulation. See *Conrad v. Conrad*, 66 Cal. App.
40 2d 280, 284-85, 152 P.2d 221, 223 (1944) (federal law controls).

41 The method provided in this section for severing a joint tenancy is not exclusive. See, e.g.,
42 Civ. Code § 683.2.

43 Where a joint tenancy involves three or more joint tenants, severance by operation of this
44 section converts the decedent's interest into a tenancy in common, but does not sever the joint
45 tenancy as between the other joint tenants. For example, husband, wife, and a third person
46 create a joint tenancy during husband and wife's marriage to each other. On husband's
47 death, wife is not husband's surviving spouse and the joint tenancy is severed by operation of
48 this section. Husband's one third interest becomes a tenancy in common and does not pass

1 by survivorship. The remaining two thirds remain in joint tenancy as between the third person
2 and the former wife.

3 Paragraph (1) of subdivision (b) provides that a joint tenancy is not severed by operation of
4 subdivision (a) if the joint tenancy is not subject to severance by the decedent (for reasons
5 other than the decedent's death). For example, if the decedent is subject to a court order or
6 binding agreement prohibiting severance of the joint tenancy by the decedent, then the joint
7 tenancy is not severed by operation of subdivision (a).

8 Subdivision (c) makes clear that nothing in this section affects the rights of a good faith
9 purchaser or encumbrancer who relies on an apparent severance by operation of this section
10 or who lacks knowledge of a severance by operation of this section. For the purpose of this
11 subdivision, "knowledge" of a severance of joint tenancy includes both actual knowledge
12 and constructive knowledge through recordation of a judgment of dissolution or annulment
13 or other relevant document. See Civ. Code § 1213 (recordation as constructive notice to
14 subsequent purchasers and mortgagees). The rights of a subsequent purchaser or
15 encumbrancer are also protected if the purchaser or encumbrancer relies on an affidavit or
16 declaration executed under Section 5602. The remedy for a person injured by a transaction
17 with a subsequent purchaser or encumbrancer is against the transacting joint tenant and not
18 against the purchaser or encumbrancer.

19 **§ 5602. Certification of rights under this part**

20 5602. (a) Nothing in this part affects the rights of a purchaser or encumbrancer
21 of real property for value who in good faith relies on an affidavit or a declaration
22 under penalty of perjury under the laws of this state that states all of the
23 following:

24 (1) The name of the decedent.

25 (2) The date and place of the decedent's death.

26 (3) A description of the real property transferred to the affiant or declarant by
27 an instrument making a nonprobate transfer or by operation of joint tenancy
28 survivorship.

29 (4) Either of the following, as appropriate:

30 (A) The affiant or declarant is the surviving spouse of the decedent.

31 (B) The affiant or declarant is not the surviving spouse of the decedent, but the
32 rights of the affiant or declarant to the described property are not affected by
33 Probate Code Section 5600 or 5601.

34 (b) A person relying on an affidavit or declaration made pursuant to subdivision
35 (a) has no duty to inquire into the truth of the matters stated in the affidavit or
36 declaration.

37 (c) An affidavit or declaration made pursuant to subdivision (a) may be
38 recorded.

39 **Comment.** Section 5602 provides a procedure for certifying that a person's rights to real
40 property transferred on the death of a spouse or former spouse, by an instrument making a
41 nonprobate transfer or by operation of joint tenancy survivorship, are not affected by this
42 part. See also Code Civ. Proc. § 2015.5 (certification or declaration under penalty of
43 perjury); Prob. Code §§ 210-212 (recording evidence of death affecting title to real
44 property).

45 **§ 5603. Application of part**

46 5603. (a) This part is operative on January 1, 2000.

1 (b) Except as provided in subdivision (c), this part applies to an instrument
2 making a nonprobate transfer or creating a joint tenancy, whether executed
3 before, on, or after the operative date of this part.

4 (c) Sections 5600 and 5601 do not apply, and the applicable law in effect
5 before the operative date of this part applies, to an instrument making a
6 nonprobate transfer or creating a joint tenancy in either of the following
7 circumstances:

8 (1) The person making the nonprobate transfer or creating the joint tenancy
9 dies before the operative date of this part.

10 (2) The dissolution of marriage or other event that terminates the status of the
11 nonprobate transfer beneficiary or joint tenant as a surviving spouse occurs
12 before the operative date of this part.

13 **Comment.** Section 5603 governs the application of this part.

14 Under subdivision (c), where a dissolution of marriage, or other event terminating a
15 person's status as a decedent's surviving spouse occurs before January 1, 2000, that person's
16 rights as a nonprobate transfer beneficiary or joint tenant of the decedent are not affected by
17 Section 5600 or 5601. See Section 78 ("surviving spouse" defined).

CONFORMING REVISIONS

Fam. Code § 2024 (amended). Notice concerning effect of judgment on will, insurance, and other matters

SEC. _____. Section 2024 of the Family Code is amended to read:

2024. (a) A petition for dissolution of marriage, nullity of marriage, or legal separation of the parties, or a joint petition for summary dissolution of marriage, shall contain the following notice:

“Dissolution or annulment of your marriage may automatically affect the rights of your former spouse regarding such things as your will, life insurance proceeds, trust benefits, retirement death benefits, power of attorney designation, pay on death bank accounts, transfer on death vehicle registration, and joint tenancy survivorship. You should review these matters, as well as any credit cards, other credit accounts, and credit reports to determine whether they should be changed or reaffirmed ~~Please review your will, insurance policies, retirement benefit plans, credit cards, other credit accounts and credit reports, and other matters that you may want to change in view of the dissolution or annulment of your marriage, or your legal separation. However, some changes may require the agreement of your spouse or a court order (see Part 3 (commencing with Section 231) of Division 2 of the Family Code). Dissolution or annulment of your marriage may automatically change a disposition made by your will to your former spouse.”~~

(b) A judgment for dissolution of marriage, for nullity of marriage, or for legal separation of the parties shall contain the following notice:

“Dissolution or annulment of your marriage may automatically affect the rights of your former spouse regarding such things as your will, life insurance proceeds, trust benefits, retirement death benefits, power of attorney designation, pay on death bank accounts, transfer on death vehicle registration, and joint tenancy survivorship. You should review these matters, as well as any credit cards, other credit accounts, and credit reports to determine whether they should be changed or reaffirmed ~~Please review your will, insurance policies, retirement benefit plans, credit cards, other credit accounts and credit reports, and other matters that you may want to change in view of the dissolution or annulment of your marriage, or your legal separation. Dissolution or annulment of your marriage may automatically change a disposition made by your will to your former spouse.”~~

Comment. Section 2024 is amended to refer to the effect of dissolution or annulment of marriage on the designation of a former spouse as attorney-in-fact, nonprobate transfers to a former spouse, and joint tenancy survivorship as between former spouses. See Prob. Code §§ 3722, 4154, 4727(e) (power of attorney), 5600 (nonprobate transfer), 5601 (joint tenancy).

Prob. Code § 5003 (amended). Protection of property holders

SEC. _____. Section 5003 of the Probate Code is amended to read:

5003. (a) A holder of property under an instrument of a type described in Section 5000 may transfer the property in compliance with a provision for a nonprobate transfer on death that satisfies the terms of the instrument, whether or not the transfer is consistent with the beneficial ownership of the property as between the person who executed the provision for transfer of the property and other persons having an interest in the property or their successors, and whether or not the transfer is consistent with the rights of the person named as beneficiary.

(b) Except as provided in this subdivision, no notice or other information shown to have been available to the holder of the property affects the right of the holder to the protection provided by subdivision (a). The protection provided by subdivision (a) does not extend to a transfer made after either of the following events:

(1) The holder of the property has been served with a contrary court order.

(2) The holder of the property has been served with a written notice of a person claiming an adverse interest in the property. However, this paragraph does not apply to a pension plan to the extent the transfer is a periodic payment pursuant to the plan.

(c) The protection provided by this section does not affect the rights of the person who executed the provision for transfer of the property and other persons having an interest in the property or their successors in disputes among themselves concerning the beneficial ownership of the property.

(d) The protection provided by this section is not exclusive of any protection provided the holder of the property by any other provision of law.

(e) A person shall not serve notice under paragraph (2) of subdivision (b) in bad faith. If the court in an action or proceeding relating to the rights of the parties determines that a person has served notice under paragraph (2) of subdivision (b) in bad faith, the court shall award against the person the cost of the action or proceeding, including a reasonable attorney's fee, and the damages caused by the service.

Comment. Section 5003(a) is amended to make clear that the section applies where a nonprobate transfer has been caused to fail by operation of Section 5600.

Subdivision (e) provides for compensation where a person serves a bad faith notice of a contrary claim to property held for the purpose of a nonprobate transfer. This provision is similar to Section 13541(d) (compensation where notice slanders title to community property after spouse's death).

Prob. Code § 5302. Sums remaining in account on death of party

SEC. _____. Section 5302 of the Probate Code is amended to read:

5302. Subject to Section 5600:

(a) Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intent. If there are two or more surviving parties, their respective ownerships during lifetime are in proportion to

their previous ownership interests under Section 5301 augmented by an equal share for each survivor of any interest the decedent may have owned in the account immediately before the decedent's death; and the right of survivorship continues between the surviving parties.

(b) If the account is a P.O.D. account:

(1) On death of one of two or more parties, the rights to any sums remaining on deposit are governed by subdivision (a).

(2) On death of the sole party or of the survivor of two or more parties, (A) any sums remaining on deposit belong to the P.O.D. payee or payees if surviving, or to the survivor of them if one or more die before the party, (B) if two or more P.O.D. payees survive, any sums remaining on deposit belong to them in equal and undivided shares unless the terms of the account or deposit agreement expressly provide for different shares, and (C) if two or more P.O.D. payees survive, there is no right of survivorship in the event of death of a P.O.D. payee thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.

(c) If the account is a Totten trust account:

(1) On death of one of two or more trustees, the rights to any sums remaining on deposit are governed by subdivision (a).

(2) On death of the sole trustee or the survivor of two or more trustees, (A) any sums remaining on deposit belong to the person or persons named as beneficiaries, if surviving, or to the survivor of them if one or more die before the trustee, unless there is clear and convincing evidence of a different intent, (B) if two or more beneficiaries survive, any sums remaining on deposit belong to them in equal and undivided shares unless the terms of the account or deposit agreement expressly provide for different shares, and (C) if two or more beneficiaries survive, there is no right of survivorship in event of death of any beneficiary thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.

(d) In other cases, the death of any party to a multiple-party account has no effect on beneficial ownership of the account other than to transfer the rights of the decedent as part of the decedent's estate.

(e) A right of survivorship arising from the express terms of the account or under this section, a beneficiary designation in a Totten trust account, or a P.O.D. payee designation, cannot be changed by will.

Comment. Section 5302 is amended to make clear that the transfer on death of funds in a multiple party account is subject to Section 5600, which causes a nonprobate transfer to a former spouse to fail if the former spouse is not the transferor's surviving spouse. See Section 5600 (effect of dissolution of marriage on a nonprobate transfer).

Prob. Code § 6202 (repealed). Spouse defined

SEC. _____. Section 6202 of the Probate Code is repealed.

6202. ~~"Spouse" means the testator's husband or wife at the time the testator signs a California statutory will.~~

Comment. Section 6202 is repealed to eliminate the inconsistency in the operation of Section 6122 and Section 6227. Section 6122 revokes a disposition to a former spouse in a will executed before or during the testator's marriage to the former spouse. For the purposes of a statutory will, Section 6202 defines a "spouse" as a person who is married to the testator at the time the testator signs the statutory will. This means that Section 6227 only revokes a disposition to a former spouse in a statutory will that is executed after the testator's marriage to the former spouse. See *Estate of Reeves*, 233 Cal. App. 3d 651, 284 Cal. Rptr. 650 (1991).

Prob. Code § 21111 (amended). Failed transfer

SEC. _____. Section 21111 of the Probate Code is amended to read:

21111. Except as provided in Section 21110:

(a) If a transfer, other than a residuary gift or a transfer of a future interest, fails for any reason, ~~the property transferred becomes a part of the residue transferred under the instrument.~~ the property is transferred as follows:

(1) If the transferring instrument provides for an alternative disposition in the event the transfer fails, the property is transferred according to the terms of the instrument.

(2) If the transferring instrument does not provide for an alternative disposition but does provide for the transfer of a residue, the property becomes a part of the residue transferred under the instrument.

(3) If the transferring instrument does not provide for an alternative disposition and does not provide for the transfer of a residue, the property is transferred to the decedent's estate.

(b) If a residuary gift or a future interest is transferred to two or more persons and the share of a transferee fails for any reason, the share passes to the other transferees in proportion to their other interest in the residuary gift or the future interest.

Comment. Section 21111 is amended to clarify the treatment of a failed transfer by will, trust, life insurance policy, or other instrument transferring property at death, where the transferring instrument does not provide for the transfer of a residue.